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In The

Supreme Court of the United States

October Term, 1963

No. 729

Keith Wilson, Jeanne Wilson, Earl Dew, Helen Dew, Philip Hendrickson, Dorothy Hendrickson, Howard Speyer, Gladys Speyer, Richard Eriksen, Sydney K. Magee, Mabel Magee, Jackson Hartman, Fern Hartman, Ralph J. Moore, Jr., Annabel Moore, Clarence E. Rowley, Marguerite Rowley, Dorothy Jenssen, Arnold Eriksen, Samuel E. Eichman, Ida E. Eichman, Marilyn Toms, Dale Toms, Allan C. Foster, Ross Harris, Ruth M. Harris, Elsie D. Bender, William H. Beamer, Frederick A. Boardman, Dora Boardman, Rollen G. Engler, Fern Engler, Robert B. Bowlin, Betty Bowlin, Bernice Butler, Millard Lake, Florence Lake, William R. Engler, Ralph C. Girkins, Wallace Evans, Nancy Evans, Adah Beamer, Lilian J. Engler, Fred Slagle, Howard Price, Ethel C. Price, Helen Burbage, Eleanor Burbage, and Robert L. Hinds,

Petitioners,

vs.

Washington Congregational Church,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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1304 Toledo Trust Building
Toledo 4, Ohio
Attorney for Petitioners

THE WEST TOLEDO PUBLISHING CO., INC.

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Toledo 4, Ohio
Attorney for Petitioners

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States of America:

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio made and entered by said Court on the 9th day of October, 1963 (Appendix A hereto, p. 19), and respectfully show this Honorable Court:

Opinions of the Courts Below

No opinion was rendered by the trial court. A copy of the judgment entered by the trial court making findings of fact and conclusions of law is attached hereto as Appendix B (p. 21).

Said judgment was affirmed by the Court of Appeals of Lucas County, Ohio, without opinion. A copy of the judgment entered by said appellate court is attached hereto as Appendix C (p. 27).

A Motion to Certify the Record was overruled by the Supreme Court of Ohio on the 9th day of October, 1963, without opinion. A copy of said judgment is attached hereto as Appendix D (p. 29).

An Appeal as of Right to the Supreme Court of Ohio, raising the federal constitutional question, was dismissed by said Court on the 9th day of October, 1963, without opinion. A copy of said order and judgment dismissing said Appeal is attached hereto as Appendix A (p. 19).

Jurisdiction

The date of the judgment sought to be reviewed was dated and entered the 9th day of October, 1963. By this judgment the Supreme Court of Ohio dismissed the Appeal as of Right based on the constitutional question presented by this Petition. There was no order respecting a rehearing, and there was no order granting an extension of time within which to petition for certiorari.

The case involves a denial of due process of law under the Fifth and Fourteenth Amendments to the Constitution of the United States by the application of two cases decided in the State of New York as res judicata, although there is no common party and no common issue.

The statutory provision believed to confer jurisdiction upon this Court to review the judgment of the Supreme Court of Ohio is United States Code, Title 28, Section 1257 (3).

Question Presented

Is it a denial of due process of law to apply a judgment of another state as res judicata where there is no common party and no common issue?

Constitutional Provisions Involved

The Fifth Amendment to the Constitution of the United States provides, so far as material:

> "No person shall be . . . deprived of life, liberty or property, without due process of law . . ."

The Fourteenth Amendment to the Constitution of the United States provides, so fas as material:

> "... No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

Statement of the Case

This action was brought in the Common Pleas Court of Lucas County, Ohio, to set aside and vacate a purported vote of the defendant Congregational Church to join a new denomination known as the United Church of Christ. The Petition alleged that such a vote involved matters of fundamental and traditional doctrine of faith, dogma, and procedures and constituted a departure from those heretofore held and followed by the defendant church and would deprive the plaintiffs, as a faithful minority, of their rights in the property and assets of the defendant church under the Constitution of the United States and the laws and Constitution of the State of Ohio.

The Common Pleas Court granted a Motion for Summary Judgment because, as found by the trial court, the issue of "departure" had been decided adversely to the plaintiffs in an action entitled *Cadman Memorial Church v. Helen Kenyon*, 306 N.Y. 151, 116 N.E. (2) 481 (1953), referred to below as "Cadman," and in an action entitled *First Congregational Church and Society of Burlington, Iowa, et al. v. Evangelical and Reformed Church, et al.* (2d Circ.), 305 Fed. (2) 724, cert. den. Feb. 18, 1963, hereinafter referred to as "Mayfair."

The federal question was raised in the trial court by Paragraph 12 of plaintiffs' Petition, a copy of which is appended hereto as Appendix E.

The constitutional question was raised by the Assignment of Errors in the said Court of Appeals for Lucas County, Ohio, and argued by brief, and in the Supreme Court of Ohio by an Appeal as of Right based on said constitutional question.

The judgment of the trial court became final when the Supreme Court overruled the Motion to Certify and dismissed the Appeal as of Right raising the constitutional question.

Background of Controversy

This action arose out of a purported vote of the defendant congregational church to become a local church of the United Church of Christ, a new denomination formed under a constitution adopted in July, 1961.

The question involved is whether this constituted a change from a congregational-type polity to a presbyterian-type polity. If it did, a faithful minority are entitled to the continued use of the church property. 47 Ohio Jur. (2) 296, Religious Societies, Sec. 20; 45 Am. Jur. 764, Religious Societies, Sec. 55; 76 C.J.S. 848, Religious Societies, Sec. 70.

The basic differences between a congregational-type polity and a presbyterian-type polity have been recognized in American Jurisprudence since they were defined by the Supreme Court of the United States in *Watson v. Jones*, 13 Wall. (U.S.) 679, 20 L. Ed. 666 (1872).

Under the congregational-type polity each church is an individual, autonomous church, subject to no other or higher ecclesiastical body. Thus, the defendant congregational church was associated only "in fellowship" with associations and conferences which had been created by local churches with limited powers only. The churches collectively were known as "The Congregational Christian Churches of the United States" and, although sometimes referred to as a denomination to distinguish them from other religious groups, it was not a denomination in the sense of a national, centrally-controlled, creedal church or denomination. The General Council of the Congregational Christian Churches was created by the local churches only as a national advisory agency, serving the entire fellowship, but without any supervisory authority or control over any local church.

On the other hand, the Evangelical & Reformed Church was, and is, a national, incorporated, monolithic church, having an overhead or central government known as the General Synod, with legislative, judicial, administrative and ecclesiastical functions and powers over every local church of that denomination.

The General Synod of the United Church of Christ was organized under the Constitution adopted in 1961 to take over and merge the assets and most of the functions of the General Council of Congregational Christian Churches and the assets and most of the functions of the General Synod of the Evangelical & Reformed Church.

Since the General Synod of the Evangelical & Reformed Church exercised complete ecclesiastical authority and control over every local church of that denomination, all former E. & R. Churches were made local churches of the United Church of Christ by fiat.

However, local Congregational Christian Churches, being wholly autonomous and not subject to any higher or other ecclesiastical body, were required to vote to become a part of the United Church. If a change from a congregational polity to a presbyterian polity is involved, a faithful minority is entitled to the continued use of the church property as a congregational church. By applying the *Cadman* and *Manfair* cases as res judicata, the trial court precluded a trial of this question.

The defendant church is an Ohio, non profit corporation with a written Constitution which provides in Article II that it is "amenable to no other ecclesiastical body." This provision, defining the polity of the defendant church, has not been involved in any prior case.

As shown below, the application of the *Cadman* and *Manfair* cases as res judicata in the case at bar is without precedent and is contrary to sound legal analysis.

1. Proceedings in Cadman Case

This action was brought in the Supreme Court of New York to secure a declaratory judgment that the General Council of the Congregational Christian Churches had no authority to consummate a proposed union of Congregational Christian Churches with the Evangelical & Reformed Church, to restrain the General Council from merging its assets with those of the General Synod of the E. & R. Church, and for other relief. The trial judge entered a judgment in favor of the plaintiffs for substantially all the relief prayed for (197 Misc. 125, 95 N.Y.S. (2) 133).

The Appellate Division reversed the trial court and *dismissed both the plaintiff's complaint and the defendant's counterclaim* on the ground that the trial court did not have jurisdiction over indispensible parties, stating, "A court may and ordinarily must refuse to render a declaratory judgment in the absence of such parties." (279 App. Div. 1013, 111 N.Y.S. (2) 808). In a subsequent Memorandum of Decision dated May 5, 1952, the Appellate Division stated, "The civil courts do not interfere with ecclesiastical matters in which temporal rights are not involved. . . . *This court has not considered and has made no consideration upon the questions of fact arising upon the issues as to such ecclesiastical matters;*" (279 App. Div. 1074). Thus the court obviously did not decide any question of polity.

The Court of Appeals of New York affirmed the Appellate Division in December of 1953, stating in its opinion, "Under these circumstances no ecclesiastical question is presented," and in the dissenting opinion it is stated, "We are all in accord that there is no ecclesiastical question in this case," (306 N.Y. 151, 116 NE (2) 481, 488).

Thus, *Cadman* decided only that there were indispensible parties not before the court and that the plaintiffs in that action had no property rights in the assets of the General Council which would permit the decision of any ecclesiastical question.

Cadman is not applicable to any issue in the case at bar because: (a) it did not involve a local church voting to join the United Church; (b) it did not decide any ecclesiastical question and specifically did not decide the question of "departure;" (c) it was decided in 1953 and the Constitution of the United Church was not adopted until July, 1961; (d)

none of the plaintiffs in the case at bar were parties to that action, participated therein, or controlled that litigation; and (c) none of the provisions of the Washington Church Constitution or the Constitution of the United Church were considered or involved in *Cadman* which would have been necessary to determine the issue of departure in the case at bar.

It is submitted that the application of *Cadman* as res judicata in the case at bar cannot be supported by sound legal analysis and is without precedent or authority in law.

2. Proceedings in Mayfair Case

The *Mayfair* case was decided by the Second Circuit Court of Appeals on August 1, 1963 (305 F. (2) 724). Certiorari was denied by the Supreme Court on February 18, 1963 (No. 705; October term, 1962). This case brought in as parties defendant those who were deemed "indispensible" parties in *Cadman*.

There was no trial on the merits in the District Court, and the hearing was conducted under pre-trial practice; no witnesses testified, no evidence was permitted, except the *Cadman* record, and the only issue was whether the *Cadman* case was applicable in *Mayfair* as res judicata. The trial judge held it was, but stated: "The consideration of the merits of the controversy between the parties has not been reached in this court." (198 F. Supp. 677).

On appeal the Second Circuit Court of Appeals in *Mayfair* held (1) that *Cadman* was a class action; (2) that the plaintiffs in *Mayfair* are members of the same class and

were adequately represented by the plaintiffs in *Cadman;* (3) that no legal issue was raised in *Mayfair* which was not decided in *Cadman;* and (4) that the issues decided in *Cadman* were: (a) the General Council had the legal right under its Constitution to merge its assets with those of the General Synod of the E. & R. Church, and (b) that no ecclesiastical question was decided in *Cadman.*

The document under consideration in *Cadman* was the so-called *Basis of Union,* and the Circuit Court of Appeals in *Mayfair* couldn't tell whether the New York Court of Appeals in *Cadman* upheld the Basis of Union on the merits or found that it was beyond the jurisdiction of the court to question its invalidity. Thus, in a footnote (305 F. (2) 724, 729) the Court says:

> "While it is not wholly clear from the Court of Appeals decision whether it upheld the Basis of Union on the merits or because the question of its invalidity was beyond the cognizance of the civil courts, it would make no difference to resolution of the issues presented here which of these grounds of decision was in fact adopted."

Thus, if the U. S. Circuit Court in *Mayfair* couldn't tell whether the Basis of Union had been approved in *Cadman* on the merits, the Circuit Court in *Mayfair* obviously did not hold that *Cadman* decided the issue of departure.

In other words, the plaintiffs in *Mayfair,* as well as the plaintiffs in *Cadman,* could not show a property interest in the assets of the General Council. Under New York law there can be no decision of an ecclesiastical question unless property rights are involved.

Neither *Cadman* nor *Mayfair*, therefore, decided that it was not a departure for a local church to join the United Church under the Constitution adopted in 1961. That question was not involved in either case. Nor was the provision of Article II of defendant's Constitution that it is "amenable to no other ecclesiastical body" involved or considered in those cases.

And, whereas the Federal Court in *Mayfair* was bound to follow the *Cadman* decision as to the property rights of the plaintiffs in the assets of the General Council, that limitation isn't present in the case at bar.

The Importance of the Case

Prior to the so-called merger there were approximately 5800 churches located throughout the United States and over one and a quarter million members comprising the historic Congregational Christian Churches of the United States. There are approximately 350 such churches in Ohio with approximately 90,000 members, according to the 1960 Yearbook.

There are still approximately 1200 Congregational Christian Churches which have failed or refused to become a part of the United Church, according to unofficial figures shown in the 1963 Yearbook of the United Church.

The importance and significance of the case at bar is, that if *Cadman* and *Mayfair* are applicable as res judicata in this case, they are also applicable as res judicata on the departure issue in every one of the remaining 1200 Congregational Churches which are still confronted with the

merger issue. Based upon the facts before this Court, it is reasonable to infer that in every instance where a vote has been taken it has been represented to the congregation that the departure issue was settled in *Cadman* and *Mayfair* for all churches, and in any event, wherever a faithful minority has raised its ugly head the defense of res judicata based on the New York cases has been asserted. See *Berkau, et al. v. Mayflower Congregational Church*, Case No. 611-604, pending on the Docket of the Circuit Court of Wayne County, Michigan, Appendix F (p. 38).

It is indeed anomalous if the reversal of the trial court in *Cadman* for the technical reasons converts that case to a judgment on the merits for the relief prayed for in the Cross-Complaint which was *expressly dismissed* by the appellate courts, or decides the departure issue here.

Under date of November 20, 1963, the General Council of the Congregational Christian Churches, (supposedly merged into the General Synod of the United Church), issued a bulletin over the signature of its Secretary which states that the decision of the Supreme Court of Ohio dismissing the Appeal in the case at bar had become final, and further:

> "The complaint had contended that the United Church of Christ was a departure from congregationalism and that the action of the church in voting to become a part of the United Church deprived the plaintiffs, who claimed to be a 'faithful minority,' of their rights in the property and assets of the church. . . . No one can now conscientiously contend that there are any legal uncertainties as to the validity of the Basis of Union and the Constitution, or that a church will lose its traditional congregational autonomy by joining the United Church."

Neither *Cadman* nor *Mayfair* justifies any such statement. Yet the statement shows the kind of representation being made on the basis of the Summary Judgment below applying the New York cases as res judicata.

1. The Decision Below Is In Conflict With Applicable Decisions of the Supreme Court and Has Deprived Petitioners of Their Constitutional Rights of Due Process.

As shown above, the judgment of the trial court in *Cadman* granted the plaintiffs substantially all the relief prayed for but was reversed by the Appellate Division (2-1) because there were indispensible parties not before the court and the plaintiffs had failed to show any property rights in the assets of the General Council. This judgment of reversal was affirmed by the New York Court of Appeals (4-2).

This was not a judgment "on the merits" on the issue of departure of a local church seeking to join the United Church and this Court has firmly adhered to the rule that a judgment rendered on any grounds which do not involve the merits of the action may not be used as a basis for operation of the doctrine of res judicata. *Swift v. McPherson*, 232 U.S. 51, 58 L. Ed. 499, 34 S.C. 239; *Costello v. U.S.*, 365 U.S. 256, 286 (1961); *Murray v. Pocatello*, 226 U.S. 318, 323-4.

The decision in *Mayfair* was based on *Cadman* being res judicata of the issues raised in *Mayfair*. Therefore, *Mayfair* decided nothing that wasn't previously decided by *Cadman*. If these prior suits and the case at bar do not involve the

same claim, demand, and cause of action, the effect of res judicata should not be given to the prior judgments. *Meyers v. International Trust Co.*, 263 U.S. 64, 68 L. Ed. 165, 44 S. C. 86; *Mobile City v. Kimball*, 102 U.S. 691, 26 L. Ed. 38. In this respect, there must be not only identity of the subject matter but also of the cause of action. *Travel v. Delaware, etc. Railway*, 227 U.S. 434, 57 L. Ed. 586, 33 S. C. 274.

As shown in the following section, there is a *prima facie* denial of due process if a party sought to be bound by res judicata was not, in fact, a party or privy to the prior adjudication. *Postal Telegraph-Cable v. City of Newport*, 247 U.S. 463, 467; 62 L. Ed. 1215, 1221 (1918); *Hansberry v. Lee*, 311 U.S. 32, 85 L. Ed. 22, 61 S.C. 115 (1940).

In so far as the case at bar holds that *Cadman* and *Mayfair* have adjudicated the issue of departure for the defendant church, this case is in conflict with the decisions of this Court cited above.

2. Under Prior Decision of This Court It Is a Denial of Due Process of Law In Violation of the Fifth and Fourteenth Amendments to the Constitution of the United States to Enter a Summary Judgment Based on the Application of Prior Cases In Another State as Res Judicata When the Parties Are Neither the Same Nor In Privity and There Is No Common Issue.

In *Hansberry v. Lee*, 311 U.S. 32, 85 L. Ed. 22, 61 S.C. 115 (1940), supra, this Court held that it is a denial of due

process of law to make a judgment in a class suit conclusive on absent parties unless the evidence shows that the interests of the absent parties are identical with those of the parties to the action in order to insure that the interests of the absent parties had been adequately protected.

In the opinion of this Court in the *Hansberry* case, Mr. Justice Stone stated (311 U.S. 40):

> "State courts are free to attach the descriptive labels to litigations before them as they may choose and to attribute to them such consequences as they think appropriate under state constitutions and laws, subject only to the requirements of the Constitution of the United States. But when the judgment of a state court, ascribing to the judgment of another court the binding force and effect of res judicata, is challenged for want of due process it becomes the duty of this Court to examine the course of procedure in both litigations to ascertain whether the litigant whose rights have thus been adjudicated has been afforded such notice and opportunity to be heard as are requisite to the due process which the Constitution prescribes. *Western Life Indem. Co. v. Rupp*, 235 U.S. 261, 273, 59 L. Ed. 220, 224, 35 S.C. 37."

* * * * * * * * *

> "It is one thing to say that some members of a class may represent other members in a litigation where the sole and common interest of the class in the litigation is either to assert a common right or to challenge an asserted obligation. . . . It is quite another to hold that all those who are free alternatively either to assert rights or to challenge them are of a single class, so that any group merely because it is

of a class so constituted, may be deemed adequately to represent any other of the class in litigating their interests in either alternative. Such a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those who they are deemed to represent, does not afford that protection to absent parties which due process requires. . . ." (p. 45)

There is no evidence in the case at bar to show that the interests of the plaintiffs here are identical with those of the parties in *Cadman* and *Mayfair*. The defendant church, as pointed out above, is an Ohio non-profit corporation. It is a separate legal entity with a written constitution and as to it, the issue of departure arises under its constitution which was not involved in either *Cadman* or *Mayfair*. These are not rights which the plaintiffs in *Cadman* or *Mayfair* asserted or attempted to adjudicate, and *as to these rights* neither *Cadman* nor *Mayfair* is a class action. See: *International Order of Machinists v. Street*, 367 U.S. 774, 779, 793, 6 L. Ed. (2)1164, 1167, 1175, 81 S.C. 1803, 1805, 1812.

Furthermore, it is apparent upon the face of the pleadings here and from the opinions of the courts in the prior cases that the interests sought to be protected here are not the same as the interests which the parties in the prior cases litigated.

The doctrine of res judicata rests upon the ground that the party to be affected, or some other with whom he is in privity, has litigated or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction. *Postal Telegraph-Cable Co. v. City of Newport*, 247 U.S. 463, 62 L. Ed. 1215, 1221; *Pennoyer v. Neff*, 95 U.S. 714, 733; 24 L. Ed. 565, 572.

The application of *Cadman* and *Mayta* under the circumstances, on a motion for summary judgment, as res judicata is not sustained by any evidence and is a denial of due process of law as guaranteed by the Fifth and Fourteenth Amendments of the Federal Constitution.

The Legal Question Involved In This Case Is of Great and Far-Reaching Importance

The legal question presented here, narrowly stated, is whether a summary judgment must comply with the requirements of due process of law. In this case, prior decisions of a sister state were applied as res judicata without reference to the factors which make one case res judicata as to another, and obviously as an expedient method to dispose of a case that might be complicated or politically embarrassing. This is not due process of law.

Furthermore, there are approximately [illegible] remaining Congregational Churches still confronted with the merger issue. If *Cadman* and *Mayfair* are applicable as res judicata on the issue of departure in the case at bar, they would likewise be applicable on this issue in any subsequent case as to each of the remaining churches. Since there has never been a trial on the merits of this issue this would, we submit, be a gross injustice.

But of greater and more far-reaching importance is the fact that other denominations, such as the Presbyterians, Episcopalians, and Methodists are presently engaged in "conversations" contemplating eventual merger of all or some of these denominations under some new, hybrid type of organization, possibly the United Church of Christ. If

this Petition is granted and the cause remanded for a trial on the merits on the issue of departure as to church polity, church officials and lawyers engaged in present merger negotiations will have a caveat to follow meticulously legal procedures in dealing with local churches and their members.

On the other hand, if this Petition is denied, we may suggest that it will be a clear indication to the proponents of any such merger that the rights of individuals in their churches, as heretofore upheld by the courts under the departure doctrine, is a dead issue in American jurisprudence, and that the courts no longer will become involved in any such dispute.

Thus, this case is not merely a dispute between private parties seeking to resolve their petty differences by litigation, but in its present stature, presents questions of great public interest.

CONCLUSION

For the reasons stated above this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioners

APPENDIX A

THE SUPREME COURT OF THE STATE OF OHIO

1963 TERM

To Wit: Oct. 9, 1963

No. 38235

THE STATE OF OHIO,
City of Columbus.

KEITH WILSON, *et al.*,
Plaintiff-Appellants,

vs.

WASHINGTON CONGREGATIONAL CHURCH,
Defendant-Appellee.

APPEAL FROM THE COURT OF APPEALS FOR LUCAS COUNTY

This cause, here on appeal as of right from the Court of Appeals for Lucas County was heard in the manner prescribed by law and upon motion of the appellee to dismiss such appeal.

On consideration thereof, such appeal is dismissed for the reason that no debatable constitutional question exists herein.

It is further ordered that the defendant appellee recover from the plaintiffs appellants its costs herein expended; that a mandate be sent to the Court of Common Pleas to carry this judgment into execution, and that a copy of this entry be certified to the Clerk of the Court of Appeals for Lucas County for entry.

APPENDIX B

In The

COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

No. 190424

KEITH WILSON, *et al.*,

Plaintiffs.

vs

THE WASHINGTON CONGREGATIONAL CHURCH OF TOLEDO, LUCAS COUNTY, OHIO

Defendant.

JOURNAL ENTRY

This day this cause came on to be heard on plaintiffs' motion that conclusions of fact be found separately by the Court from conclusions of law; plaintiffs' one suggested conclusion of fact; defendant's objection to plaintiffs' proposed conclusion of fact and suggestions as to same; and plaintiffs' objections to proposed findings of fact and conclusions of law submitted by defendant; and the oral arguments, briefs and statements of counsel in connection therewith; and the Court being fully advised in the premises, finds that the motion that conclusions of fact be found separately by the Court from conclusions of law should be

and the same hereby is granted to the extent and in the manner hereinafter set forth.

This day this cause further came on to be heard on the petition, answer, supplement to answer, reply, defendant's motion for summary judgment (and the affidavits and exhibits filed in support thereof and in opposition thereto or introduced in evidence at the time of the hearing), the records and briefs in prior litigation (hereinafter referred to), the oral arguments, briefs and statements of counsel, and upon the evidence.

The petition in this action brought by the named plaintiffs as members of defendant Washington Congregational Church alleges that the vote of said church to become a part of the United Church of Christ effected a departure from the traditional doctrine, faith, dogma and procedures formerly held by defendant church as a church of the Congregational Christian faith and order, and as such deprived plaintiffs of their rights in its properties and assets. The petition also objects to the procedure employed in taking such vote. The petition seeks to have the aforesaid vote declared void and to restrain defendant from carrying out the aforesaid vote in any way.

Defendant's answer contains a general denial and affirmative defenses in which it is alleged that issues here sought to be determined have already been adjudicated in two prior class actions in which the plaintiffs here were represented by the class plaintiffs which created an estoppel by judgment and was res judicata as to such issues. It is upon these defenses that defendant moves for summary judgment.

THE COURT BEING FULLY ADVISED IN THE PREMISES, FINDS that the pleadings, affidavits, admissions of the genuineness of papers and documents, and the evidence before the Court, show that there is no genuine issue as to any material fact but only disputed questions of law and that defendant Washington Congregational Church is entitled to judgment as a matter of law.

THE COURT FURTHER AND SEVERALLY FINDS AND SPECIFIES that each of the following facts exists without controversy or is not actually and in good faith controverted, to-wit:

1. An action was heretofore instituted in the Supreme Court of the State of New York, County of Kings, by the Cadman Memorial Congregational Society of Brooklyn and the Cadman Memorial Church, suing on behalf of themselves and other Congregational Christian Churches similarly situated, against Helen Kenyon, as Moderator of the General Council of the Congregational Christian Churches of the United States, as defendant. Final judgment in the said action (hereinafter referred to as the "Cadman case") was rendered in favor of said defendant and against said plaintiffs. The decisions in said action are reported at 195 Misc. 124, 95 N. Y. S. 2d 133, rev'd., 279 App. Div. 1015, 1074, 111 N.Y.S. 2d 808 (2d Dept. 1952), aff'd. 306 N.Y. 151, 116 N. E. 2d 481 (1953).

2. An action was heretofore instituted in the United States District Court for the Southern District of New York by the Mayfair Congregational Church of Toledo, Ohio, its minister Angus MacDonald, one of its members, and others, as plaintiffs against Evangelical and Reformed

Church, and others as defendants. Final judgment in that action (hereinafter referred to as the "Mayfair case") was rendered in favor of defendants and against plaintiffs, the decision being reported at 198 Fed. Supp. 677, under the title First Congregational Church and Society of Burlington, Iowa, et al, plaintiffs v. Evangelical and Reformed Church, et al, defendants. (Aff'd. Aug. 1, 1962, C. A. 2d Docket No. 27258).

3. On May 8, 1961, defendant Washington Congregational Church issued a letter to all its members announcing that a majority of such members had voted to approve the Constitution of the United Church of Christ and in favor of Washington Congregational Church becoming a part of it. Said vote was 154 for and 55 against approving such Constitution. The events leading up to the issuance of said letter dated May 8, 1961 by defendant are set forth in Paragraphs 7 to 11 inclusive of defendant's Answer and Appendix A and Appendix B thereto.

4. Upon the filing of the petition in this case a temporary injunction was issued without notice to defendant or any hearing thereon, and service of the same, together with summons in this case, was served upon plaintiff Earl Dew as statutory agent for defendant.

THE COURT CONCLUDES AS MATTERS OF LAW THAT:

I Plaintiffs in the Cadman case represented a class of which plaintiffs in the present action were members and claimed and sought declarations of rights

and interests in the subject matter of the litigation which included all the rights and interests asserted by plaintiffs herein, except plaintiffs' objections to the voting procedure employed). Plaintiffs herein are estopped by said judgment from litigating the issues presented herein (except plaintiffs' objections to the voting procedure employed) and said case is res judicata as to such issues.

II. Plaintiffs in the Mayfair case represented a class of which plaintiffs in the present action were members and claimed and sought declarations of rights and interests in the subject matter of the litigation which included all the rights and interest asserted by plaintiffs herein, (except plaintiffs' objections to the voting procedure employed). Plaintiffs herein are estopped by said judgment from litigating the issues presented herein (except plaintiffs' objections to the voting procedure employed) and said case is res judicata as to such issues.

III. Washington Congregational Church has taken lawful and proper procedure to approve the Constitution of the United Church of Christ and become a part of it and is now a local church of the United Church of Christ.

IV. The vote to approve the Constitution of the United Church of Christ and in favor of defendant, Washington Congregational Church, being a part of it, was in all respects legal and proper and did not involve any change whatsoever in the Constitution of defendant church.

V. The procedure employed by defendant on and prior to May 7, 1961, to secure a vote on approving the Constitution of the United Church of Christ and in favor of defendant church becoming a part of it, was in all respects legal and proper.

VI. The temporary injunction issued upon the filing of this case, without notice to defendant or hearing thereon, ought not to have been granted.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the temporary injunction heretofore issued in this cause without notice or hearing be and the same is hereby dissolved and terminated.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiffs' petition herein be and the same is hereby dismissed with prejudice at plaintiffs' costs and that judgment be and the same hereby is entered for defendant against plaintiffs for such costs.

To each adverse portion of this journal entry the respective parties object and except.

APPENDIX C

IN THE

COURT OF APPEALS OF LUCAS COUNTY, OHIO

KEITH WILSON, *et al.*,
Plaintiffs-Appellants,
v.
WASHINGTON CONGREGATIONAL CHURCH,
Defendant-Appellee.

No. 5654

JOURNAL ENTRY

Filed 4/3/63

This day this cause came on to be heard on plaintiffs' motion for rehearing, and the briefs relating thereto and the Court being fully advised in the premises finds that said motion should be overruled.

This day this cause further came on to be heard as an appeal on questions of law, upon the assignments of error, the bill of exceptions, the transcript and original papers and pleadings from the Court of Common Pleas of Lucas County, and upon the briefs and arguments of counsel for the respective parties, and the Court being duly advised in the premises finds that there was no genuine issue of fact presented incident to the granting of defendant-appellee's motion for summary judgment denying plaintiffs-appellants' prayer for an injunction, and the Court finds that no error prejudicial to plaintiffs-appellants occurred during any of the proceedings herein.

It is, therefore, ORDERED, ADJUDGED and DECREED that the plaintiffs' motion for rehearing be and the same hereby is overruled.

It is further ORDERED, ADJUDGED and DECREED that the judgment of the Court of Common Pleas of Lucas County heretofore entered in this cause be and the same hereby is affirmed, and that defendant-appellee have and recover from plaintiffs-appellants its costs herein expended and that this cause be and the same hereby is remanded to the Court of Common Pleas of Lucas County for execution for defendant-appellee's costs herein.

To each adverse portion of this journal entry, the respective parties object and except.

(s) DEEDS *Judge*

APPENDIX D

THE SUPREME COURT OF THE STATE OF OHIO

1963 TERM

To Wit: Oct. 9, 1963

No. 38235

THE STATE OF OHIO,
City of Columbus.

KEITH WILSON, *et al.*,
Plaintiff-Appellants,

vs.

WASHINGTON CONGREGATIONAL CHURCH,
Defendant-Appellee.

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS FOR LUCAS COUNTY TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Swartzbaugh, Meor & Longthorne.

APPENDIX E

In The

COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

No. 190424

KEITH WILSON, *et al.*,

Plaintiffs

vs

THE WASHINGTON CONGREGATIONAL CHURCH OF TOLEDO, LUCAS COUNTY, OHIO

Defendant.

PETITION

1. Plaintiffs are members in good standing of the defendant, Washington Congregational Church.

2. Defendant is a non-profit corporation organized and existing under and by virtue of the laws of the State of Ohio and a member of the Congregational Christian Fellowship with its church building and place of worship in the City of Toledo, Ohio.

3. The General Synod of the United Church of Christ is an ecclesiastical body formed in 1957 for the purpose of merging the Evangelical and Reformed Church and the Congregational Christian Churches of the United States into the United Church of Christ under a Constitution approved by the General Synod of said United Church of Christ on July 6-8, 1960.

4. Under said Constitution a local church of the Congregational Christian fellowship becomes a local church of the United Church of Christ by approving said Constitution and/or voting to become a part of it. The United Church of Christ is composed of local churches, associations, conferences and the General Synod. Said Associations, Conferences, and General Synod are ecclesiastical bodies. By becoming a part of said United Church of Christ a local church thereof is amenable to said ecclesiastical bodies under said Constitution which expressly provides that actions by, or decisions or advice emanating from, the General Synod, a Conference or an Association, should be held in the highest regard by every local church.

5. Congregational Christian Churches have a heritage and tradition going back more than four hundred years. There are currently approximately six thousand Congregational Christian churches in the United States. Under the congregational system heretofore followed by said churches, each church owns its property, and so far as church government is concerned is autonomous and owes no fealty or obligation to any higher ecclesiastical authority. There is no overall constitution for churches of said fellowship, written or otherwise.

6. In conformity with the said tradition of the Congregational Christian Churches and pursuant to the statutes of Ohio defendant adopted a Constitution and By-laws for the conduct of the business of the church which, at all times mentioned herein, was in full force and effect. Said Constitution and By-laws contained the following provisions, to wit:

a) ARTICLE II **Government and Fellowship**

The government of this church is vested in its members, who exercise the right of control in all its affairs. It is amenable to no other ecclesiastical body, but it accepts the obligations of mutual counsel, comity and co-operation involved in the free fellowship of the Congregational Churches and pledges itself to share their common aims and work. This church is in direct fellowship with the Toledo Association, the Congregational Conference of Ohio, and the National Council of Congregational Churches of the United States; and with all churches which seek to promote the Kingdom of our Lord, Jesus Christ.

b) ARTICLE XI **Amendments**

This Constitution may be amended by a two-thirds vote of the members present at any Annual Meeting of the Church or at a meeting specially called for that purpose, proposed amendment being inserted in the call. But no change shall be made in Article II except at an Annual Meeting and by a three-fourths vote of the members of the Church present and voting, said proposed change having been laid before the Church in writing at a business meeting not less than one month before the time of the proposed action and read from the pulpit on the Lord's Day next succeeding the proposal.

c) ARTICLE VIII **Meetings**

Public services shall be held each week on the Lord's Day. The Lord's Supper shall be observed at such season as the Pastor and the Board of Deacons shall determine. The annual meeting of the

Church shall be held on the Friday following the second Sunday in January, to hear the yearly reports of the officers, organizations and boards, to elect officers, to transact business and to adopt plans for the new year. Special meetings of the Church may be called by the Minister or the Moderator at the request of the Church Council or any of the boards, or on the written request of five adult members, specifying the objects thereof. Such notice shall be read at the public service on the Lord's Day next preceding the day fixed for such meeting. No special meeting shall be held on the same day on which the notice is given.

A quorum at any meeting of the Church shall consist of 50 voting members. A majority vote of the members shall ordinarily be decisive. The calling of a minister, to be done usually upon the recommendation of not less than two thirds of the Church Council, shall require a two-thirds vote of all voting members of the Church present at a meeting especially called for this purpose.

7. By letter dated May 8, 1961, the defendant church, announced that a majority of the members of the defendant church voting had voted "yes" on ballots on which the following appeared to-wit:

"I approve the constitution of the United Church of Christ and thus favor Washington Congregational Church being part of it."

8. Plaintiffs say that any such purported and pretended vote was not taken in accordance with the express mandatory provisions of the Constitution and By-laws of defendant church and is invalid, without legal force or effect.

and should be vacated, set aside, held for naught, and expunged from the church records for the following reasons, to-wit:

a) Article II of the Constitution and By-laws of the defendant church provides that it is "amenable to no other ecclesiastical body". A vote to approve the constitution of the United Church of Christ and to make the defendant church "a part of it" is a vote to amend Article II of the Constitution and By-laws of defendant church. Such a vote can only be taken at an annual meeting and by a three-fourth vote of the members of the church present and voting.

b) No such vote took place at a meeting of the church at which a quorum was determined or declared to be present.

c) There is no provision in the Constitution and By-laws of defendant church for taking a secret vote outside of a regularly constituted meeting of members at which a quorum is present.

d) There is no provision in the Constitution and By-laws which permits the accumulation of votes of members on any subject taken from time to time and outside of a meeting of members duly called in accordance with said Constitution and By-laws.

e) There is no provision in the Constitution and By-laws for absentee ballot, or voting by mail or proxy.

f) There is no provision in the Constitution and By-laws for ratification of a vote of members taken other than in accordance with the provisions thereof.

9. Plaintiffs say that the members of defendant church were advised by letter dated April 19, 1961 that the voting

to approve the Constitution of the United Church of Christ and "to become a part of it" would take place on April 30, 1961. The only business to come before the members at the meeting held following sabbath service on that date was the election of a trustee. Prior to and following sabbath service on said date members who wished to vote were required to go to a room adjacent to the foyer of the defendant church, sign their names to a list of the members voting, mark a ballot and deposit the same in a box through a slot.

10. Plaintiffs further say that the same procedure was followed the following Sunday, May 7, 1961 except the only matter of business presented to the meeting following sabbath service was whether the voting procedure was "fair and acceptable". No vote was taken at said meeting on the approval of the Constitution of the United Church of Christ or that the defendant church should become a part of it.

11. Plaintiffs are informed, believe, and therefore allege on information and belief that ballots were furnished to members requesting them to enable said members to vote by mail, and that such votes have been counted and included in the total vote of all persons claimed to have voted on or before May 7, 1961.

12. Plaintiffs further say that said pretended vote to make the defendant church a part of the United Church of Christ and subject to the overall constitution of said church is a vote involving matters of fundamental and traditional doctrine, faith, dogma, and procedures and a departure from those theretofore held and followed by defendant church, and would deprive these plaintiffs, as a faithful minority, of their rights in the properties and assets of

the defendant church under the Constitution of the United States and the laws and Constitution of the State of Ohio.

13. Plaintiffs say that timely objection was made to the said voting procedures before any announcement was made of the results thereof.

14. Plaintiffs further say that there is a genuine controversy between the parties hereto and that the plaintiffs are without an adequate remedy at law; that said pretended vote should be held and declared to be without legal force or effect and void; and that the defendant church, its officers, trustees, agents, and pastor should be restrained and enjoined from expending any funds of defendant church to carry out the scheme and purpose to make the defendant church a part of the United Church of Christ and subject to the constitution of that church, its Associations, Conferences, and General Synod.

WHEREFORE, plaintiffs pray as follows:

1. For a judgment finding and declaring said pretended vote on said proposed merger to be without legal force and effect and wholly void;

2. For a judgment finding and declaring that a vote of defendant church to approve the constitution of the United Church of Christ and to become a part of it involves matters of fundamental and traditional doctrine, faith, dogma, polity and procedures;

3. For a temporary order restraining and enjoining the defendant church, its officers, trustees, minister, and

agents from expending any moneys of defendant church to carry out or put into effect or maintain said proposed merger from its general funds or to transfer or convey any assets of defendant church to said United Church of Christ or to any Board or instrumentality thereof, and that on the final hearing hereof that said order be made permanent.

4. For such other and further relief to which plaintiffs may be entitled, and for their costs herein.

APPENDIX F

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE IN CHANCERY

HELEN JOAN BERKAW, GRACE PFAFF, FRANK C. SMITH and ROY L. STEPHENS, JR., *Plaintiffs*	)	
vs.	)	No. 611-604
MAYFLOWER CONGREGATIONAL CHURCH, a Michigan corporation, *Defendant*	)	

MOTION TO DISMISS

Now comes the above named defendant by Dykema, Wheat, Spencer, Goodnow and Trigg, its attorneys, and makes this motion to dismiss the above entitled cause and the plaintiff's bill of complaint on the following grounds:

1. Plaintiffs are barred from maintaining this action by reason of two prior adjudications by which the matters raised in the complaint herein have been finally and conclusively determined against them.

a. By the final judgment in a certain action commenced on or about April 18, 1949 in the Supreme Court, State of New York, County of Kings, entitled "Cadman Memorial

Congregational Society of Brooklyn and The Cadman Memorial Church, suing on behalf of themselves and other Congregational Christian Churches similarly situated plaintiffs, against Helen Kenyon as Moderator of the General Council of the Congregational Christian Churches of the United States, defendant." The decisions in said action are reported at 197 Misc. 124, 95 N. Y. Supp. 2d 133, reversed 279 App. Div. 1015 (2d Dept. 1952), aff'd 306 N.Y. 151, 116 N.E. 2d 481 (1953). * * * * * * *

b. By a certain action commenced in June, 1957 in the United States District Court for the Southern District of New York entitled "First Congregational Church and Society of Burlington, Iowa, et al., plaintiffs v. Evangelical and Reformed Church, et al, defendants", . . . The plaintiffs herein, having been members of the class represented in the Federal District Court action, are concluded by the adjudications made therein on principles of full faith and credit and judicial comity.

. . . . . .

This motion is based upon the files and records in this cause and on the affidavits of Loren T. Wood and Louis E. Taylor attached hereto.

Dated: July 18, 1961

DYKEMA, WHEAT, SPENCER, GOODNOW & TRIGG
Attorneys for Defendant
2746 Penobscot Building
Detroit 26, Michigan

Office-Supreme Court, U.S.
FILED
FEB 5 1964
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1963.

No. 729.

KEITH WILSON, *et al*
Petitioners,

vs.

WASHINGTON CONGREGATIONAL CHURCH,
Respondent.

RESPONDENT'S BRIEF

Opposing Petition for Writ of Certiorari to the Supreme Court of the State of Ohio.

FRED A. SMITH,
7th Floor Toledo Trust Building,
Toledo 4, Ohio,
Attorney for Respondent.

Of Counsel:
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In the Supreme Court of the United States

OCTOBER TERM, 1963.

No. 729.

KEITH WILSON, *et al.*,
Petitioners,

vs.

WASHINGTON CONGREGATIONAL CHURCH,
Respondent.

RESPONDENT'S BRIEF
Opposing Petition for Writ of Certiorari to the Supreme Court of the State of Ohio.

PRELIMINARY STATEMENT.

All forms of emphasis in this brief, unless otherwise noted, are ours.

Respondent, Washington Congregational Church, is located in one of Toledo, Ohio's residential suburbs. Petitioners are a minority faction of the members of respondent's congregation. Petitioners in this court do not include all plaintiffs-appellants in the Ohio courts. One such plaintiff-appellant, who is a noticeable absentee from petitioners, is Jane G. Swartzbaugh, wife of R. B. Swartzbaugh, counsel for petitioners.

PRIOR PROCEEDINGS.

Although not mentioned in the petition in this case, Mr. R. B. Swartzbaugh, counsel for petitioners, in January of 1963 filed a "Motion For Leave to File Brief as Amicus Curiae and Brief in Support of Petition for a Writ of Certiorari" in Case Number 705 on the October, 1962 docket of this court, entitled "First Congregational Church and Society of Burlington, Iowa, et al., Petitioners, against Evangelical and Reformed Church, et al., Respondents."

Said Case Number 705, and prior proceedings therein, are referred to in the petition herein and in the balance of this brief as the "Mayfair" case, as one of the petitioners in said Case No. 705 was Mayfair Congregational Church of Toledo, Ohio. Other petitioners included Mayfair's minister and a member of such church. Case No. 705 was a class action brought on behalf of such petitioners and *all* other Congregational Churches, ministers and members (including, of course, petitioners and respondent in this case).

The appendix to Mr. Swartzbaugh's motion and brief in the Mayfair Case No. 705 consisted of the Journal Entry of the trial court in *this* case and certain pleadings, or portions thereof, in *this* case (including portions not a part of the appendix to the petition herein, namely excerpts from the Answer and Motion for Summary Judgment of this Respondent, Washington Congregational Church. See pages 20-27 of appendix in Case No. 705).

Mr. Swartzbaugh's Motion for Leave to File Brief as *Amicus Curiae* was granted; and after consideration of that brief by this court, the Writ of Certiorari in the *Mayfair* case was denied on February 18, 1963 (9 L. ed. 2nd 723).

Also not mentioned in the petition herein as a part of the proceedings in the Ohio courts is the fact that plain-

tiffs-appellants filed a Motion for Rehearing in the Court of Appeals of Lucas County, Ohio, which Motion was overruled. (See Journal Entry, Appendix C, page 27 of petition.)

The first two paragraphs of such motion for rehearing demonstrated that plaintiffs-appellants believed the case had been decided on the merits as a question of law for the court, in view of the admissions in the pleadings, and without any reference to the question of *res judicata* or *collateral estoppel* or to any federal issue whatsoever. Thus, the first two paragraphs of plaintiffs-appellants' Motion for Rehearing in the Court of Appeals of Lucas County stated:

> "Now come the plaintiffs-appellants and move the Court for a rehearing and reargument of the appeal herein because it appears that the Court has erroneously found that there are no genuine issues as to any material fact, whereas the contrary can be demonstrated beyond reasonable legal argument and the Court has erroneously *construed the Ohio law* relating to the construction and interpretation of contracts.
>
> "Thus, it is our understanding that the Court concluded that the so-called Cadman and Mayfair cases were neither applicable as res judicata nor as collateral estoppel but that the reply had admitted that the 'steps' set forth in the Appendix to the Answer concerning the proceedings leading up to the merger vote had been taken and *that the construction and interpretation* of the Constitutions of the defendant and the United Church *was merely a matter of law for the Court*. The Court then of necessity must have concluded that the provisions of defendant's Constitution did not prevent a vote to change the denominational status of this church and that the defendant was entitled to summary judgment as a matter of law."

The petition herein further fails to state that the order granting this Respondent's Motion to Dismiss the Appeal to the Supreme Court of Ohio for the reason that no debatable constitutional question exists is officially reported at 175 Ohio St. 264 (1963). This order is referred to at page 2 of the petition herein and is set forth as Appendix A of page 19 of such petition.

NO QUESTIONS WERE PRESENTED FOR REVIEW BY THIS COURT.

Respondent denies that the record in this case presents the question stated in the petition or any federal question; denies that the constitutional provisions cited by petitioners are in anywise involved; and denies that this court has jurisdiction to review the judgment of the Supreme Court of Ohio.

This brief of respondent, insofar as practicable, will avoid any discussion of the merits of the controversy and be limited to pointing out to this court that:

(a) The question sought to be reviewed was not timely or properly raised or expressly passed on in the Ohio courts.

(b) The judgment below rests on adequate non-federal basis. (See plaintiffs-appellants' Motion for Rehearing in the Court of Appeals of Lucas County, Ohio, set forth above.)

(c) This case does not present a substantial federal question.

STATEMENT OF CASE.

This action was brought in May, 1961 in the Common Pleas Court of Lucas County, Ohio, by a dissenting minority of respondent's congregation. The action was to enjoin the carrying into effect of a vote by respondent's congregation to approve the constitution of the United Church of Christ and to become a part of, and in fellowship with, such denomination.

It was plaintiffs' contention that any fellowship with that denomination would restrict the autonomy of respondent church and be contrary to respondent's constitution, and was therefore improper as a "departure." Nothing has been done, or proposed to change the constitution of respondent, its name, or to change so much as the dotting of an "i" or the crossing of a "t" in respondent's articles, constitution or by-laws.

The frivolous and specious character of petitioners' claim that fellowship with the United Church of Christ destroys the autonomy of a local church is clearly demonstrated from a mere reading of the constitution of the United Church of Christ as Article IV, Section 21 thereof specifically states:

> "The autonomy of the local church is *inherent and modifiable only by its own action*. Nothing in this Constitution and the By-Laws of the United Church of Christ *shall destroy or limit* the right of each local church to continue to operate in the way customary to it; nor shall be construed as giving to the General Synod, or to any Conference or Association, *now or at any future time*, the power to abridge or impair *the autonomy of any local church* in the management of its own affairs, which affairs include, but are not limited to, the right to retain or adopt its own methods or organization, worship and education; to retain or secure its own *charter* and *name*; to adopt its *own*

constitution and by-laws; to formulate its own covenants and confessions of faith; to admit members in its own way and to provide for their discipline or dismissal; to call or dismiss its pastor or pastors by such procedure as it shall determine; to acquire, own, manage, and dispose of property and funds; to control its own benevolences; *and to withdraw* by its own decision from the United Church of Christ at any time without forfeiture of ownership or control of any real or personal property owned by it."

In addition to being perfectly obvious from a mere reading of the foregoing Article IV, Section 21, the so-called issue of "departure" has been decided adversely to petitioners in two prior actions, namely, *Cadman Memorial Church v. Kenyon*, 306 N. Y. 151, 116 N. E. 2d 481, generally referred to as the *Cadman* case and in the case of *First Congregational Church, etc., et al. v. Evangelical and Reformed Church, et al.* (CCA 2d, 1963), 305 F. 2d 724, Certiorari Denied February 18, 1963, herein referred to as the *Mayfair case*. As previously stated counsel for petitioners was granted leave to and did file a brief *amicus curiae* in this Court in the latter mentioned case.

There is no basis for the statements in the petition herein for a writ (page 8) that the *Cadman* case did not decide the issue of *departure* "on the merits," merely because the *Cadman* case also decided other issues which involved certain funds. The *Cadman* case was a class action brought on behalf of all Congregational churches. The opinion of the Court of Appeals of New York (306 N. Y. 151, 116 N. E. 2d 481) states in part:

"According to its complaint the plaintiff is proceeding upon the theory that the proposed United Church of Christ is and will be so alien and different in structure and polity that fundamental congregational usage and practice will be wholly lost and destroyed."

After reviewing the *facts* touching on such issue of *departure*, the Court of Appeals found the plaintiffs' claim to be without merit and stated:

> "Every possible assurance is given that each member church will continue to possess the same freedom of faith and manner of worship as heretofore enjoyed—that there will be no interference nor abridgment of congregational usage and practice. In short, there is no power and none is claimed by which the General Council can compel or intends to compel the plaintiff Cadman or any other nonassenting church to join the Union unwillingly or impose upon them a change of faith or doctrine. Union depends on voluntary action freely taken by independent autonomous churches. If any doubt remains, it seems abundantly clear from this record that the very nature of Congregationalism, surviving as it has the vicissitudes of time for nearly four hundred years, assures the integrity of the individual Congregational Christian Church, its faith and independence. Under these circumstances no ecclesiastical question is presented (cf. Watson v. Jones, 13 Wall [U. S.] 679)."

The opinion of the Court of Appeals of New York then took up a discussion of other issues involving certain funds and after disposing of such issues, the Court of Appeals' opinion concludes:

> "On this record, the *proof having established* that the Basis of Union is voluntary and *in no way interferes with Congregational faith* or *manner of worship*, and the plaintiffs having failed to establish any direct or beneficial interest in and to the unrestricted funds of the General Council, its various boards, agencies and instrumentalities, and having failed to show that any such general funds are to be used for other than authorized charter purposes, *the complaint was properly dismissed on the merits*."

It is perfectly apparent that the issue of departure was considered on its merits and as the Court of Appeals of New York specifically stated: "* * * the complaint was properly dismissed *on the merits.*"

There likewise is no basis for the statements in the petition herein for a writ (pages 9 *et seq.*) that the *Mayfair* case (305 F. 2d 724) did not consider the issue of departure or did not hold that the *Cadman* case decided such issue "on the merits," and that such decision was *res judicata* and binding on the issue of departure in Mayfair. In reference to the issue of departure, the Second Circuit Court of Appeals stated:

> "* * * The questions of the validity of the General Council's action and its effect on individual congregations were legal issues in which *all* the present plaintiffs have the same interest as the *Cadman* plaintiffs and to which the differences in their various situations are irrelevant; and thus as to these questions *the decree is binding on all.*" (p. 729.)

Upon this case being filed in May, 1961 in the Court of Common Pleas of Lucas County, Ohio, service was made upon one of plaintiffs as statutory agent for respondent and an injunction issued ex parte. Plaintiffs in the trial court unsuccessfully objected to respondent securing time to file an answer; moved to strike the answer when filed because they claimed that respondent was unauthorized to retain an attorney to represent it; and filed a series of other motions and pleadings which delayed the filing of a reply and a disposition of the case upon the merits. Plaintiffs were finally forced to file a reply in the spring of 1962.

The issues being thus made up, respondent filed its Motion for Summary Judgment, which after extended hearings and arguments was granted by the trial court in September of 1962. The complete records in the *Mayfair*

and *Cadman* cases, together with numerous affidavits and copies of relevant documents, including the constitutions of respondent and the United Church of Christ, were in evidence before the trial court.

The trial court in its Journal Entry (Appendix B to petition, pages 21 *et seq.*) made certain findings of fact and conclusions of law. One finding was that respondent's congregation had voted 154 for and 55 against approving the constitution of the United Church of Christ. One conclusion of law was that such a vote was, in all respects, legal and proper and did not involve any change whatsoever in the constitution of respondent church. Another conclusion of law was that the procedure employed by respondent to secure such a vote was, in all respects, legal and proper; and a still further conclusion was that respondent had taken all lawful and proper procedure and was a local church of the United Church of Christ. The findings and conclusions further were that the so-called issue of "departure" had been litigated at length in the *Mayfair* case and *Cadman* case and the decisions in those cases were *res judicata* and *estoppel* by judgment to further trials on such issues.

On appeal to the Court of Appeals for Lucas County, Ohio appellants listed three assignments of error, none of them making any reference to the constitution of the United States. The first of such three assignments of error was:

> "The trial court erred in granting defendant's motion for summary judgment because of genuine issues of material fact as to Article II of defendant's Constitution."

The second and third assignments of error in the Court of Appeals were identical, except that they respectively referred to Article VIII and Article IV of defendant's constitution.

After the Court of Appeals made a docket entry sustaining the trial court, and before the Journal Entry was filed, appellants in the Court of Appeals filed a motion for rehearing, excerpts from which are set forth above (page 3) claiming that the Court of Appeals "erroneously construed the Ohio law relating to the construction and interpretation of contracts" and that appellants understood that the Court of Appeals had concluded "that the construction and interpretation of the constitutions of the defendant and the United Church of Christ was merely a matter of law for the court."

As shown by the Journal Entry in the Court of Appeals (Appendix C, page 23 of petition) the motion for rehearing was overruled and judgment of the trial court affirmed.

The Court of Appeals was the final court that passed on the issues below, as the Supreme Court of Ohio overruled the motion to certify the record because the case was not one of general public interest (Appendix D, page 29 of petition), and granted respondent's motion to dismiss the appeal "for the reason that no debatable constitutional question herein exists." (Appendix A, page 19 of petition.) 175 Ohio St. 264.

ARGUMENT AND LAW.

(a) The question sought to be reviewed was not timely or properly raised or expressly passed upon in the courts below.

The alleged question presented, set forth on page 3 of the petition, was not raised, argued or briefed in the trial court or the Court of Appeals. The first mention of such "asserted" question was in the last assignment of errors listed in appellants' brief in the Supreme Court of Ohio.

Petitioners now claim the federal question presented is whether the application of *res judicata* herein is a denial of due process of law. Page 5 of the petition states the question was raised in the trial court by paragraph 12 of plaintiffs' petition in that court (Appendix E, page 35 of petition). Such paragraph makes no reference to the question of *res judicata*. That issue was first raised in respondent's answer filed August 21, 1961 about three months after plaintiffs instituted suit. While such answer is not included as an appendix to the petition in this case, excerpts thereof setting forth such defenses of *res judicata* and *estoppel* by judgment, as well as excerpts from respondent's motion for summary judgment filed March 13, 1962, appear as part of the appendix to Mr. Swartzbaugh's brief as amicus curiae in 1962 Cause Number 705, the *Mayfair* case.

There are no pleadings, proceedings or briefs in the trial court wherein any claims are made that the application of *res judicata* involves any constitutional question. The Journal Entry, including the findings and conclusions of the trial court (Appendix B, page 21 of petition) makes no reference to any federal question; nor did petitioners ever file any exceptions to the findings and conclusions set forth in the journal entry of the trial court suggesting any federal question.

It is likewise true that petitioner's assignment of errors and brief, including the appendix thereto, in the Court of Appeals of Lucas County, Ohio, make no reference or citations to any provisions of the constitution of the United States or of the State of Ohio.

On page 5 of their petition, the claim is made that a constitutional question was raised by the assignment of errors in the Court of Appeals and argued by brief. That is not correct. As previously stated there were only three assignments of error in that court and they referred only to the constitution of respondent church.

Furthermore, as demonstrated by excerpts (quoted *ante*, page 3) from the appellants' motion for rehearing in the Court of Appeals, petitioners conceded that the Court of Appeals actually decided the case as a question of Ohio law involving the interpretation of certain written documents.

The first mention of any alleged federal question was in the last assignment of errors set forth in appellants' brief in the Supreme Court of Ohio. Respondent as appellee, filed in the Supreme Court of Ohio, a motion to dismiss the appeal therein on the grounds that no constitutional question was presented and that motion was granted. (175 Ohio St. 264, Appendix A, page 19, petition.)

Appellants' sixty-one page brief in the Supreme Court of Ohio devoted about three and one-half pages (pages 57-60 inclusive) to a discussion of the so-called constitutional question. Respondent's sixty-nine page brief in the Supreme Court of Ohio referred to such question only on page 64 thereof. Respondent's brief stated in part:

> "* * * we do want to point out that no constitutional issue is properly before this Court, as none was assigned as error in the Court of Appeals, or briefed or argued in the Courts below."

"A recent statement of this long established rule appears in *State, ex rel., v. Shannon, Presiding Judge*, 170 Ohio St. 393 (1960) where in *Per Curiam* opinion the Court said:

"'It is an established rule of long standing in this state that a constitutional question, either in a civil or criminal action, cannot be raised in the Supreme Court unless it was presented and urged in the courts below. *Hoffman v. Staley*, 92 Ohio St., 505, 112 N. E., 1084; *Cuthbertson v. State*, 106 Ohio St., 658, 140 N. E., 941; *Zimmerman v. Morris Plan Bank of Cleveland*, 113 Ohio St., 703, 150 N. E., 920 and *Village of Clarington v. Althar*, 122 Ohio St. 608, 174 N. E., 251.'"

"The necessity of first presenting to the Court of Appeals *any* issue that is to be considered by the Supreme Court is pointed out in *State of Ohio v. Wirick*, 81 O. S. 343. The third syllabus of that case holds:

"'Objections which do not affect jurisdiction of the subject matter, and which were not made in the intermediate court of appellate jurisdiction will not be entertained in this Court.'"

No extended citation of authority is needed in support of the well established rule and practice of this Court that any alleged federal question sought to be reviewed must be timely or properly raised or expressly passed on in the courts below. This Court in the case of *Edelman v. State of California*, 344 U. S. 357 (1952) said:

"It is clear that this Court is without power to decide whether constitutional rights have been violated when the federal questions are not seasonably raised in accordance with the requirements of state law. Hulbert v. Chicago, 202 US 275, 50 L ed 1026, 26 S Ct 617 (1906); Mutual Lifes Ins. Co. v. McGrew, 188 US 291, 308, 47 L ed 480, 484, 23 S Ct 375, 63 LRA 33 (1903). Noncompliance with such local law

can thus be an adequate state ground for a decision below * * *." (pp. 358-359.)

We submit that on the record before this Court, it is obvious that the question stated in the petition was not timely or properly raised or expressly passed on by the courts below, and that there is no ground for granting a writ of certiorari in this case.

(b) The judgment below rests on an adequate non-federal basis.

The dispute herein only involves the meaning and interpretation of certain written documents, namely the constitution of the United Church of Christ and the constitution of respondent church. No change was made in the name, or the constitution or by-laws of respondent church, and such finding was made by the trial court. The claim that the autonomy of a local church is destroyed by the constitution of the United Church of Christ is completely refuted by merely reading Article IV, Section 21 of the Constitution of the United Church of Christ, set forth in full at pages 5-6 *ante*. It is perfectly apparent that the judgment below would be eminently proper without any reference whatever to any prior litigation.

Even after the judgment in the trial court was affirmed by the Court of Appeals of Lucas County, Ohio, plaintiffs-appellants filed a motion for a rehearing, asserting that the Court of Appeals had in fact concluded that the *Cadman* and *Mayfair* cases "were neither applicable as res judicata nor as collateral estoppel," and that the Court of Appeals had merely passed upon the construction and interpretation of two written documents as "a matter of law for the courts." Petitioners' own contention in that court on rehearing was that such court's decision was on an entirely non-federal basis. It is obvious that there is an

adequate non-federal basis for the judgment below and no federal question was ever raised in the trial court, or the Court of Appeals.

The fact that no federal question was seasonably raised before the Supreme Court of Ohio (*State ex rel., v. Shannon, Presiding Judge, ante* page 13) is in itself an adequate state ground for the decision below. *Edelman v. State of California, ante* page 13.

In *Stembridge v. State of Georgia*, 343 U. S. 541 (1957) this Court said:

> "At this stage, the Supreme Court of Georgia could have denied certiorari on adequate state grounds. Where the highest court of the state delivers no opinion and it appears that the judgment *might* have rested upon a non-federal ground, this Court will not take jurisdiction to review the judgment. Hedgebeth v. North Carolina, 334 U. S. 806, 92 L. ed 1739, 68 S. Ct. 1185; Woods v. Nierstheimer, 328 U. S. 211, 90 L. ed 1177, 66 S. Ct. 996; White v. Ragen, 324 U. S. 760, 89 L. ed 1348, 65 S. Ct. 978; McGoldrick v. Gulf Oil Corp. 309 U. S. 2, 84 L. ed 537, 60 S. Ct. 375; Woolsey v. Best, 299 U. S. 1, 81 L. ed 3, 57 S. Ct. 2; Lynch v. New York, 293 U. S. 52, 79 L. ed 191, 55 S. Ct. 16; Cuyahoga River Power Co. v. Northern Realty Co., 244 U. S. 300, 303, 304, 61 L. ed 1153, 1157, 1158, 37 S. Ct. 643; Adams v. Russell, 229 U. S. 353, 358-362, 57 L. ed 1224, 1226-1228, 33 S. Ct. 846; Allen v. Arguimbau, 198 U. S. 149, 154, 155, 49 L. ed 990, 993, 25 S. Ct. 622; Johnson v. Risk, 137 U. S. 300, 307, 34 L. ed 683, 686, 11 S. Ct. 111; Klinger v. Missouri (U. S.) 13 Wall 257, 263, 20 L. ed 635, 637.
>
> "* * * We are without jurisdiction when the question of the existence of an adequate state ground is debatable. Bachtel v. Wilson, 204 U. S. 36, 51 L. ed 357, 27 S. Ct. 243.

"The petition for certiorari was improvidently granted, and the case is dismissed."

For such additional reasons, there is no ground for granting a writ of certiorari herein.

(c) The case does not present any substantial federal question.

Although petitioners did not timely or properly raise any federal question, and the judgment below certainly rests on adequate non-federal basis, even assuming that the question posed by petitioners had been timely or properly raised, and passed upon by the Ohio courts, the petition herein would not have presented any substantial federal question.

The *Mayfair* case, in which counsel for petitioners filed a brief amicus curiae, was brought by a number of congregational churches, their ministers and individual members on behalf of themselves and all other congregational churches, ministers and members, as a class action to determine the rights of all. The petitioners and respondent in this case were adequately represented in such litigation that was carried to this court. The named plaintiffs in the *Mayfair* case included the Mayfair Congregational Church of Toledo, Ohio, its minister and one of its members. The Mayfair Church is located only a few miles from the respondent church and the *Mayfair* litigation was, of course, of interest and well known to petitioners and respondent.

In the *Mayfair* litigation the issue of "departure" was for the second time thoroughly gone into and held to be without merit, a determination that would seem to be obvious in view of the clear provision of Article IV, Section 21 of the constitution of the United Church of Christ, quoted at pages 5-6 *ante*.

A judgment in a class action is, of course, a bar to all members of the class represented. In *Smith v. Swormstedt*, 57 U. S. (16 How.) 288, which was a class action seeking determination of the rights of superannuated ministers of the Methodist Episcopal Church South in the United States, the court states at pages 301-2:

> "For convenience, therefore, and to prevent a failure of justice, a court of equity permits a portion of the parties in interest to represent the entire body, and *the decree binds all of them* the same as if all were before the court. The legal and equitable rights and liabilities of all being before the court by representation, and especially where the subject matter of the suit is common to all, there can be very little danger but that the interest of all will be properly protected and maintained."

Hartford Life Insurance Co. v. Ibs, 237 U. S. 662 was an action by a beneficiary on a policy of life insurance. There had been a prior class action in another state by certain members and beneficiaries against the insurance company, although neither the plaintiff in the *Ibs* case nor her decedent were named parties in such prior litigation. This court held that the former class action was decisive as to all issues therein raised, which were again raised in the later litigation, stating:

> "It is said, however, that even if the decree determining the status and use to be made of the Mortuary Fund, was binding on members and beneficiaries, it could not be offered in evidence in a suit on a policy of insurance, since the cause of action and the thing adjudged in the two cases was different—one involving the status of the Fund and the rights of members therein, while the present case related to the right of a beneficiary to recover on a policy and the power of the Company to declare a forfeiture. But the defendant's contention that the policy had lapsed * * *

raised an issue as to the right of the Insurance Company to levy the assessment. On that issue the Connecticut decree was admissible since it adjudged that the Company had the right to make advances to pay claims and could subsequently collect the amount of such claim by an assessment levied as in the present case. *Its right so to do having been determined by a court of competent jurisdiction the decree was binding between the parties and their privies in any subsequent case in which the same right was directly or collaterally involved.* (Emphasis supplied.) For *even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established so long as the judgment in the first suit remain unmodified.* (Court's emphasis.) *Southern P. R. C. v. United States*, 168 U. S. 48, 49."

In *Watson v. Jones*, 80 U. S. 679, this Court stated:

"The law knows no hearsay, and is committed to the support of no dogma, the establishment of no sect."

In *Kedroff v. St. Nicholas Cathedral*, 344 U. S. 94, this Court pointed out that no constitutional doctrine is more firmly established than that there exists "a spirit of freedom for religious organizations, an independence from secular control, or, in short, power to decide for themselves free from state interference, matters of church government as well as those of faith and doctrine."

We respectfully submit that this case could not present any substantial federal question, even assuming that the same had been timely or properly raised, and passed upon in the Ohio courts, and that for such further and additional reason that there is no ground for granting a writ of certiorari herein.

CONCLUSION.

For the reasons stated above, the petition herein should be denied.

Respectfully submitted,

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